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No. 03-284

IN THE

Supreme Court of the United States

SOCIETE NATIONALE DES CHEMINS DE FER FRANCAIS,

Petitioner,

v.

RAYMOND ABRAMS, NICOLE B. SILBERKLEIT, JANET HERMAN, LILY REDNER, BERNARD CARON, ERNEST HAAR, HARRY CYBULSKI, YVONNE LITMAN, CASSANDRA KIRBY CONAHAY FREUND, JEAN-JACQUES FRAENKEL, LILIANE LICHTENSTEIN and MARIE WEINRAUCH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should grant the petition for a writ of certiorari of Société Nationale des Chemins de Fer français ("SNCF") to review the unanimous decision of the United States Court of Appeals for the Second Circuit which:

> a. Remanded the case to the District Court for discovery relevant to the issue of whether SNCF, a separate commercial corporation, could be sued in United States courts prior to the passage of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602, *et seq.* (the "FSIA"); and
>
> b. Does not conflict with any decision of any other Circuit Court of Appeals, all of which properly applied the principles articulated by this Court in its decision in *Landgraf v. USI Film Products,* 511 U.S. 244 (1994), in analyzing the permissible retroactive reach of the FSIA?

2. Whether the Second Circuit correctly instructed the District Court to seek documentary information from the United States Department of State as to its position, prior to the enactment of the FSIA, on the amenability to suit in United States courts of separate corporate entities owned by foreign governments?

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STATEMENT OF THE CASE

This suit is brought on behalf of survivors and heirs of non-survivors deported during World War II from France to Nazi death camps on the trains of the defendant commercial corporation, Société Nationale des Chemins de Fer français.[1] SNCF seeks this Court's review of the determination by the Second Circuit Court of Appeals that application of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1330, 1602-11, to claims arising from SNCF's conduct during World War II may have an impermissible retroactive effect on the rights and settled expectations of Plaintiffs. The Second Circuit has remanded the case to the District Court for discovery to develop a sufficient record on which to determine whether such an impermissible retroactive effect exists under the particular facts of this case.

No final decision granting or denying immunity to SNCF has been made. Review at this stage of the proceeding is unwarranted because of the immature record. Nonetheless, SNCF is attempting to avoid this inquiry, conjuring non-existent conflicts among the Circuits and between the Circuits and this Court. Since passage of the FSIA, United States courts have used the same type of retroactivity analysis approved in *Landgraf v. USI Film Products,* 511 U.S. 244 (1994) with consistency in resolving immunity issues in cases arising from pre-FSIA conduct. For these reasons, as demonstrated below, the petition for a writ of certiorari should be denied.

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[1]The United States District Court for the Eastern District has jurisdiction over the claims at issue here pursuant to 28 U.S.C. §§ 1331, 1350 and 1367. *See* Pet. App. at 10a.

SNCF's Corporate Status and Actions.

This is not a law suit against a government and SNCF is not a sovereign. Thus, SNCF mis-characterizes the nature of this case. *See* Petition for a Writ of Certiorari ("Pet.") at 2-3. SNCF misleads as to its own corporate structure by referring to itself as the "French National Railway" (Pet. at 2). It avoids translating the word "société," the French equivalent of "corporation" in English. Its correct name in English is "French National Railroad Corporation." SNCF, created in 1938 by the consolidation of five French regional rail networks, is a large and profitable corporation currently owned by the government of France. SNCF erroneously seeks to equate this case with those seeking damages from "foreign sovereigns." *See* Pet. at 1. The government of France is not a party to this law suit and has not appeared. This is a law suit against a separate legal entity, a commercial corporation, based on its commercial, profit-making activities. *See* Appendix to the Petition ("Pet. App.") at 2a.

At all relevant times, SNCF was a separate corporation and "preserved its independence by collaborating with the German authorities and by accommodating their transportation needs." Pet. App. at 2a. SNCF implemented, and was paid for, the death camp deportations as a private entrepreneur under civilian control. SNCF charged per head, per kilometer, for the services provided.

SNCF sent its first train of Jews and other "undesirables" to Auschwitz on March 27, 1942, and sent its last train on August 17, 1944. It operated 72 such convoys deporting more than 76,000 Jews; fewer than three percent survived. Included among SNCF's deportees to the death camps were 186 American, Canadian and British pilots shot down over France. SNCF scheduled the deportation trains as ordinary commercial transactions, and SNCF personnel operating the trains were

ordinary employees acting in the ordinary course of business. They ran the trains and, after each trip, cleaned and disinfected the cars. The organization and operation of the deportation trains were simply a matter of routine, and SNCF was totally responsible for its acts and decisions.[2] SNCF selected the trains, which were mostly cattle cars; the "conditions inside the deportation trains were inhumane and frequently fatal." *See* Pet. App. at 3a. The deportation trains were clearly marked, and their destinations – death camps like Dachau and Auschwitz – well known.

SNCF charged a fee for each of the "passengers" on the deportation trains, equivalent to the standard commercial fares for train tickets purchased by ordinary travelers, and billed the Nazis quarterly in the ordinary course of business. After the liberation of Paris, SNCF had at least one unpaid bill for these trains; it sent the bill to the DeGaulle government for payment. The bill was duly paid.

The conduct of SNCF constitutes a violation of the law of nations, including aiding and abetting in the commission of war crimes and violations of the Nuremberg Principles. *See* Pet. App. at 2a-3a.

Proceedings Below.

SNCF moved to dismiss Plaintiffs' complaint, claiming that it was entitled to sovereign immunity pursuant to the FSIA. Plaintiffs opposed SNCF's motion, arguing that the question of immunity should be resolved based on the law in effect at the time of the alleged acts, that SNCF, as a separate corporate entity,

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[2]SNCF misleadingly refers to SNCF "contributing" to the deportations. *See* Pet. at 2. In fact, SNCF was the only entity involved and handled all aspects of the deportations itself.

would have had no immunity at that time, and that therefore, applying the FSIA would be impermissibly retroactive. Plaintiffs also cross-moved for discovery, arguing that whether SNCF was entitled to immunity could not be resolved based on the existing record. *See* Pet. App. at 4a.

In November 2001, the District Court for the Eastern District of New York granted SNCF's motion to dismiss. The District Court concluded that § 1330 of the FSIA was the sole source of the Court's subject matter jurisdiction over Plaintiffs' claims and that none of the exceptions to foreign sovereign immunity set forth in the FSIA applied to this case. Pet. App. at 36a-67a. The District Court also denied Plaintiffs' cross-motion for discovery. Pet. App. at 74a n.11.

In June 2003, the United States Court of Appeals for the Second Circuit reversed and remanded in a unanimous decision, holding that the District Court had failed to do the analysis mandated by this Court in *Landgraf*, to determine if the application of the FSIA to the case at bar was impermissibly retroactive.[3] Pet. App. at 13a-24a. The Second Circuit held that application of the FSIA to grant immunity today to SNCF, if it had no such immunity prior to the enactment of the FSIA, would be impermissibly retroactive. However, because the existing record was insufficient for any such determination, discovery was required. Pet. App. at 25a-26a. The Second Circuit was thus unable to decide if the FSIA could be applied retroactively to this case, and instructed the District Court to develop the record as to

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[3]Under *Landgraf*, a court, in evaluating the retroactivity of a statute, must determine if there is any clear Congressional intent as to its retroactivity, and if not, whether a retrospective application of the statute in question would impair rights or create liability that did not previously exist. *See Landgraf*, 511 U.S. at 280.

whether the Plaintiffs could have had their claims adjudicated in the courts of the United States. *See* Pet. App. at 26a.

The Need to Conduct Discovery.

The District Court is now engaged in developing the record on which to base a *Landgraf* analysis. It will be reviewing, among other things, any existing evidence obtained from the United States Department of State, the history of any prior suits brought against SNCF in United States courts, and information on the structure and autonomy of SNCF at the time of the alleged wrongs. The resulting record will not be "speculation" as SNCF argues (Pet. at 28), but rather will be based on a review of documentary evidence. This fully developed record will permit the District Court to perform the analysis required by the Second Circuit and by this Court in *Landgraf*, and enable the District Court to render a decision as to whether SNCF is entitled to immunity.

SNCF is wrong when, in the second of the Questions Presented (Pet. at i), and in its fourth reason requesting certiorari, it argues that the Second Circuit has called for an "uncharted search for the past." Pet. at 6. That is not what the Second Circuit has required. The Second Circuit has asked for the development of a record to determine whether "plaintiffs legitimately could have expected to litigate their claims in the United States" prior to the FSIA's enactment. Pet. App. at 26a. Part of that record would include documents in the possession of the State Department; for example, any requests from France or Vichy for immunity for SNCF or other entities that were granted, denied or ignored, internal memoranda on the significance of the corporate form, and the position of the Executive Branch on granting immunity to belligerents during World War II.

Going forward with discovery to complete the record would cause no harm to SNCF, which made no effort to obtain a rehearing *en banc*, did not move to stay the entry of mandate, and has not moved to stay discovery in the District Court. A delay in discovery would, however, irreparably prejudice the Plaintiffs, as parties and witnesses grow older or die. Plaintiffs anticipate, moreover, that discovery can be completed within a reasonable period of time, and at that point, the District Court will be able to determine whether SNCF is entitled to its claimed immunity defense.

REASONS FOR DENYING THE PETITION

The petition should be denied for the reasons set forth below.

1. There is nothing in the Second Circuit's remand for further discovery that conflicts with any other Circuits' approach to fact-finding and decisions on issues of FSIA retroactivity. A developed record will result in a proper foundation for decision. *See* Points I. and IV.A.

2. The Circuit Courts unanimously agree that the *Landgraf* analysis should be used whenever a party challenges the retroactivity of the FSIA. With regard to the first step of the *Landgraf* analysis, no Circuit Court has found a clear congressional intent to apply the FSIA retroactively. The second step of the inquiry seeks to determine whether a party's rights and expectations are adversely affected by retroactive application of the FSIA. This inquiry is not solely for the benefit of a proposed defendant sovereign, but as the Second Circuit recognized, may properly consider the rights and expectations of plaintiffs as well. *See* Points II.A and B.

3. The FSIA is a substantive statute that defines the substantive law of sovereign immunity. See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983). Even if the FSIA were to be viewed as an exclusively jurisdictional statute, it is nonetheless subject to the *Landgraf* retroactivity analysis in accordance with *Hughes Aircraft Co. v. United States*, 520 U.S. 939 (1997). *See* Point II.C.

4. SNCF is a separate corporate entity that was not entitled to immunity prior to the FSIA. *See* Point II.C.

5. Denial of the Petition will comport with public policy and will not result in a multitude of suits against foreign sovereigns over old wrongs. *See* Point IV.B.

I. THERE IS NO CONFLICT AMONG THE CIRCUITS REQUIRING THIS COURT'S ATTENTION.

SNCF incorrectly contends that the Second Circuit's decision in this case conflicts with the decisions of other Circuit Courts. No such conflicts exist, much less an important conflict compelling a grant of certiorari. *See Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) (dismissing the petition for writ of certiorari, where there was no "real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals"). Every Circuit Court that has considered the application of the FSIA to conduct occurring prior to its passage – the Second, Ninth, Eleventh, and District of Columbia Circuits – has concluded that the FSIA should not be applied retroactively to impair the pre-existing rights and settled expectations of the parties.

A. There is no conflict with the Ninth Circuit.

SNCF attempts to manufacture a conflict with the Ninth Circuit's decision in *Altmann v. Republic of Austria*, 317 F.3d 954 (9th Cir. 2003) (petition for a writ of certiorari pending). However, the Ninth Circuit in *Altmann* adhered to the *Landgraf* presumption against retroactivity and followed the same two-part analysis applied by the Second Circuit in this case. The Ninth Circuit first assumed, without deciding, that Congress had not clearly expressed an intent that the FSIA be applied to "pre-enactment facts," then "turn[ed] to the second prong of the *Landgraf* test and examine[d] 'whether applying the FSIA would "impair rights a party possessed when he acted."'" *Altmann*, 317 F.3d at 964 (citation omitted). Considering the particular facts and claims at issue, the Ninth Circuit determined that Austria would not have enjoyed immunity from claims based upon Nazi expropriations either during or after the war and thus could have had no reasonable expectation of immunity.[4] Therefore, retroactive application of the expropriation exception under the FSIA would not impair Austria's existing rights. *Id.* at 965-66. This *Landgraf* analysis of the parties' antecedent rights and settled expectations is exactly what has been mandated by the Second Circuit in this case, but has not yet been completed.[5]

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[4]The Ninth Circuit acknowledged that "'[u]ntil 1952, the State Department ordinarily requested immunity in all actions against *friendly* foreign sovereigns.'" *Altmann*, 317 F.3d at 964 (quoting *Verlinden*, 461 U.S. at 486) (emphasis added by Ninth Circuit).

[5]In suggesting that this case be considered with *Altmann* because the cases purportedly raised "the same underlying questions" (*see* Pet. at 6 n.4), SNCF ignores a crucial distinction between *Altmann* and the present case: this is not a suit against a foreign government, but a suit against a separate corporate entity. The issues

(continued...)

B. There is no conflict with the District of Columbia Circuit.

The Second Circuit's decision in this case does not conflict with the decisions of the Court of Appeals for the District of Columbia in either *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994), or *Joo v. Japan*, 332 F.3d 679 (D.C. Cir. 2003). In *Princz*, the Court discussed the issue of retroactive application of the FSIA in dicta. *See Princz*, 26 F.3d at 1170-71. The Court expressly stated that it "d[id] not have to decide whether the FSIA applies to pre-1952 events . . . in order to resolve" the issues of sovereign immunity raised by Princz's claims against Germany. *Id.*

Moreover, even if there had been any conflict between the dicta in *Princz* and the Second Circuit's decision in the present case, that conflict no longer exists. In a decision issued shortly after the Second Circuit's decision here, the Court of Appeals for the District of Columbia expressly disavowed the "suggestion" made in *Princz* that the FSIA was a jurisdictional statute that could be applied retroactively because it "simply changes the tribunal that is to hear the case." *See Joo*, 332 F.3d at 684, quoting *Landgraf*, 511 U.S. at 274. In *Joo*, Chief Judge Ginsburg (who also authored *Princz*) characterized that discussion in *Princz* as "dictum" and as contrary to this Court's decision in *Hughes Aircraft*.[6] In *Hughes*, this Court rejected the Ninth Circuit finding

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[5](...continued)
presented are materially different. *See* Points II.C, *infra*.

[6]Furthermore, SNCF errs when it states, without authority, that the District of Columbia Circuit held that the FSIA "as a jurisdictional statute, does not implicate concerns about retroactivity (continued...)

of a presumption in favor of retroactivity for jurisdictional statutes and pointed out that the Ninth Circuit had "misread our decision in *Landgraf*, for the only 'presumption' mentioned . . . is a general presumption *against* retroactivity." *Hughes*, 520 U.S. at 950 (emphasis in the original). The District of Columbia Circuit in *Joo* confirmed that, in light of the holding in *Hughes*, even if a statute affected only jurisdiction, its application could have an impermissible retroactive effect. The Court found in that case that the FSIA "affects the substantive rights of the concerned parties" and could not be applied retroactively. *Joo*, 332 F.3d at 684.

Contrary to SNCF's contention (Pet. at 13), the District of Columbia Circuit, like the Second Circuit, has adopted the two-step *Landgraf* analytical inquiry to determine whether provisions of the FSIA should be applied retroactively. *See Joo*, 332 F.3d at 683-87.

C. There is no conflict with the Seventh Circuit

SNCF is also incorrect in contending that the Second Circuit's decision conflicts with the Seventh Circuit's decision in *Sampson v. Federal Republic of Germany*, 250 F.3d 1145 (7th Cir. 2001) (Pet. at 14-15). In that case, the Seventh Circuit was not asked to consider whether the FSIA might have an impermissible retroactive effect on the plaintiff's rights, and explicitly determined not to do so. The plaintiff there, conceding that Germany was immune as a sovereign prior to 1952,[7] did not challenge the

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[6](...continued)
at all." Pet. at 15.

[7]The doctrine of "absolute immunity" referred to by SNCF (*see* Pet. at 24) was immunity granted only to the sovereign itself, not (continued...)

retroactivity of the FSIA, but instead unsuccessfully relied on the implied waiver exception of the FSIA to overcome Germany's claim of immunity. *Sampson*, 250 F.3d at 1149 n.3.[8]

There is no conflict between the Second Circuit's decision here and the Seventh Circuit's recognition that Germany, as a sovereign nation, was entitled to immunity regardless of whether pre-1952 law or the FSIA applied. The Seventh Circuit's analysis in *Sampson*, although avoiding a decision on the retroactivity of the FSIA, is thus entirely consistent with *Landgraf*. As shown below, and as Plaintiffs argued to the Second Circuit, the pre-1952 law of sovereign immunity regarding separately incorporated entities engaged in commercial activities differed materially from the pre-1952 law as applied to the foreign sovereign itself and ordinarily permitted suits against separate entities, even if the shares of those corporations were government-owned. *See* Point II.C., *infra*.

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[7](...continued)
to separate corporate entities such as SNCF, which were amenable to suit at all times prior to the effective date of the FSIA in 1977. *See* Point II.C., *infra*. In 1952, the United States State Department issued the Tate Letter, 26 Dept. State Bull. 984 (1952), which confirmed that the United States would thereafter follow the restrictive theory in determining claims of immunity for foreign states. The restrictive theory also applied only to sovereigns, not separate entities such as SNCF, and restricted the immunity of sovereign to public acts, not commercial activities.

[8]The Seventh Circuit found, however, that there was no constructive waiver of immunity based on a *jus cogens* violation. *Sampson*, 250 F.3d at 1149-55.

In sum, the Second Circuit's decision in this case neither makes new law nor departs from the retroactivity analysis reaffirmed by this Court in *Landgraf* and *Hughes,* and followed by every other Circuit Court addressing claims arising from pre-FSIA conduct.

II. THE SECOND CIRCUIT HAS CORRECTLY DETERMINED THAT *LANDGRAF* APPLIES TO THIS CASE.

A. The Second Circuit has correctly held that Congress expressed no clear intent to apply the FSIA retroactively.

Trying to avoid an analysis of the settled expectations of the parties, SNCF argues that the intent of Congress to have the FSIA apply retroactively is clear. However, no Circuit Court has agreed with SNCF's assertion. The Eleventh Circuit found specifically that the Congressional intent was to apply the FSIA prospectively. *See Jackson v. People's Republic of China,* 794 F.2d.1490, 1497 (11th Cir.1986). The District of Columbia Circuit in *Joo* found no clear indication that Congress intended the FSIA to "apply to events occurring prior to 1952." *Joo*, 332 F.3d at 685-86. Therefore, the Second Circuit is correct in finding here that "the statutory language obviously is not so clear as to sustain only one construction and thereby to resolve conclusively the question of Congressional purpose, making additional analysis unnecessary." Pet. App. at 20a. *See also Lindh v. Murphy,* 521 U.S. 320, 328 n.4 (1997) (such situations must involve "statutory language that was so clear that it could sustain only one interpretation"). Because congressional intent to apply the FSIA retroactively could not be determined from the language of the statute, the Second Circuit then undertook the second prong of the *Landgraf* analysis to determine whether the substantive rights of

the parties would be affected by retroactive application. The Second Circuit is correct and does not err in interpreting *Landgraf,* nor does its decision conflict with decisions in other Circuit Courts in applying *Landgraf.*

B. Consistent with *Landgraf,* the settled expectations of all parties must be considered.

SNCF also contends that a conflict exists because this Court and other Circuit Courts look only to the settled expectations of the defendant sovereign, while in the present case, the Second Circuit looked to the antecedent rights and settled expectations of Plaintiffs. Under the *Landgraf* and *Hughes* line of cases, however, it is clear that both plaintiffs and defendants may have settled expectations or existing rights that may be impaired by the retroactive application of a statute. *See, e.g., Hughes,* 520 U.S. at 951 (impermissible retroactivity exists when a statute takes away or impairs rights, creates new obligations or duties, or attaches a new disability, in respect to transactions or considerations already past); *Scott v. Boos*, 215 F.3d 940, 944-47 (9th Cir. 2000) (rejecting as impermissibly retroactive application of new statute that precluded plaintiff from asserting a claim plaintiff could have pursued at the time of the alleged misconduct); *Mathews v. Kidder, Peabody & Co.*, 161 F.3d 156, 170-171 (3d Cir. 1998) (same); *Morgan Guaranty Trust Co. v. Republic of Palau*, 971 F.2d 917, 922 (2d Cir. 1992) (retroactivity concerns are raised by both the "*destruction of an existing cause of action* or creation of a new liability for past events") (emphasis added) (citing *Cohen v. Beneficial Ind. Loan Corp.*, 337 U.S. 541, 553 (1949)).

The position of SNCF would have the perverse result of considering only settled expectations and antecedent rights of a sovereign government. It would permit only sovereign

governments to argue the non-retroactivity of the FSIA, never plaintiffs seeking redress. Indeed, SNCF seems aggrieved that a *plaintiff* should seek to claim the protection against an impermissible retroactive application of the FSIA. Pet. at 15, 16, and 24. Regardless of whether antecedent rights and settled expectations of plaintiffs or of defendants are at issue, the most basic considerations of fairness require that the legal principles and analysis be the same.

C. The law of foreign sovereign immunity is substantive.

SNCF also erroneously argues that the FSIA is merely a jurisdictional statute (Pet. at 19-22), and therefore, no retroactivity analysis is required. Such an argument misstates the law in two significant respects. First, this Court has confirmed that the FSIA is substantive law and significantly changed the law of sovereign immunity, itself a doctrine of substantive law. As this Court stated in its opinion in *Verlinden*, 461 U.S. at 496-97, claims under the FSIA are claims "arising under" Article III of the Constitution:

> The Act [the FSIA] thus does not merely concern access to the federal courts. Rather, it governs the types of actions for which sovereigns may be held liable in a court in the United States, federal or state. The Act codifies the standards governing *foreign sovereign immunity as an aspect of substantive federal law*. (Emphasis supplied).

Second, SNCF is also wrong when it argues that jurisdictional statues are always to be applied retroactively. Pet. at 19-20. Neither *Landgraf* nor *Hughes* established such a rule. To

the contrary, as the Second Circuit found, *Hughes* confirmed that the presumption against retroactivity affects a jurisdictional statute to the same extent it affects other legislation. Pet. App. at 15a. This Court stated in *Hughes* that when a statute, "even though phrased in jurisdictional terms . . . speaks not just to the power of a particular court but to the substantive rights of the parties as well," the statute should not be applied retroactively. *Hughes*, 520 U.S. at 951.

SNCF incorrectly contends that the amendment to the *qui tam* provision of the False Claims Act at issue in *Hughes* was "substantive," whereas § 1603(b) of the FSIA merely "confirmed that for most purposes, a state-owned instrumentality would be treated the same way as the state itself." Pet. at 20. In *Hughes*, however, this Court made clear that the amendment at issue did not change "the monetary liability faced by an FCA defendant," but rather expanded the potential universe of plaintiffs in certain FCA cases, by letting private citizens bring suit when, under prior law, only the government could bring suit. *Hughes*, 520 U.S. at 948. That change in the law was enough to constitute an improper retroactive effect. Here, the substantive effect of the enactment of the FSIA is much greater. If the FSIA is applied retroactively in cases like this one, an entity such as SNCF would have immunity it never had prior to the promulgation of the statute.

SNCF also incorrectly suggests that Plaintiffs' case is foreclosed because prior to 1952, the United States followed the doctrine of absolute immunity. SNCF implies that plaintiffs would therefore have had no right to sue SNCF in the 1940's.[9]

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[9]In fact, SNCF was successfully sued at least seven times in United States courts between 1942 and 1963. SNCF neither raised, nor was granted, a defense of sovereign immunity. *See Wheeler v.*

(continued...)

See Pet. at 24. However, this doctrine of absolute immunity pertained only to the sovereign itself, not separate entities. There is no pre-1952 rule of "absolute immunity" for corporate entities. American jurisprudence has long recognized the distinction between a sovereign and a separate corporation owned by a sovereign. *See, e.g., Bank of the United States v. Planters Bank of Georgia,* 22 U.S. (Wheat.) 904, 907-08 (1824) ("As a member of a corporation, a government never exercises its sovereignty."). Indeed, this Court recently confirmed that "[a] basic tenent of American corporate law is that the corporation and its shareholders are distinct entities." *Dole Food Co. v. Patrickson*, 123 S. Ct. 1655, 1660 (2003); *see also,* Point III.B.

Prior to the enactment of the FSIA, this distinction was repeatedly applied by United States courts to hold that separate corporate entities (such as SNCF) owned by foreign states were amenable to suit in this country. *See, e.g., United States v. Deutsche Kalisyndikat Gesellschaft*, 31 F.2d 199, 202 (S.D.N.Y. 1929) ("private corporations in which a [foreign] government has an interest are not departments of governments" and were not entitled to sovereign immunity); *Coale v. Société Co-operative*

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[9](...continued)
Société Nationale des Chemins de Fer Français, 108 F. Supp. 652 (S.D.N.Y.1952); *Kaufman v. Société Nationale des Chemins de Fer Français,* Civil Action No. 92-130, (S.D.N.Y. Mar. 30,1954); *Shulman v. Compagnie Generale Transatlantique,* 152 F. Supp. 833 (S.D.N.Y. 1957); *Dunajevski v. Société Nationale des Chemins de Fer Français,* 35 N.Y.S.2d 102 (City Ct. N.Y. Co. 1942); *Abatangelo v. Société Nationale des Chemins de Fer français,* Civil Action No. 88-391 (S.D.N.Y. 1953); *Siegmeier v. Société National des Chemins de Fer Français,* 1 A.D.2d 879, 150 N.Y.S.2d 775 (1st Dept. 1956); *Fuss v. French National Railroads,* 35 Misc.2d 682, 231 N.Y.S.2d 57 (Sup. Ct. N.Y. Co.), *aff'd,* 17 A.D.2d 941, 233 N.Y.S.2d 1013 (1st Dept. 1962). *See* Respondent's Appendix A hereto.

Suisse des Charbons, 21 F.2d 180, 181 (S.D.N.Y. 1921); *Ulen & Co. v. Bank Gospodarstwa Krajowego*, 26 A.D. 1, 2, 24 N.Y.S. 2d 201, 206 (App. Div. 1940); *The Beaton Park*, 65 F. Supp. 211 (W. D. Wash. 1946).

The FSIA effectively abolished the separate entity rule by defining entities owned or controlled by a foreign state to be foreign states. Specifically, the FSIA defined a foreign state to include an "instrumentality" of the state, and defined an "instrumentality" to include a corporation the majority of whose shares were owned by a foreign state. 28 U.S.C. §§ 1603(a) and (b). As one scholar has pointed out, this creates "a presumption that any foreign state-owned entity is engaged in sovereign activity. This presumption, which has virtually no support in international or pre-FSIA American law, actually enlarges the immunity defense." William Hoffman, *The Separate Entity Role in International Perspective: Should State Ownership of Corporate Shares Confer Sovereign Status for Immunity Purposes*, 65 Tul. L. Rev. 535, 539-49 (1991); *see also Hyatt Corp. v. Stanton,* 945 F. Supp. 675, 688 (S.D.N.Y. 1996) (there was "an explicit rejection in the FSIA of the separate entity rule"). Thus, the FSIA changed the substantive law of immunity by extending sovereign immunity to state-owned corporate entities such as SNCF.

Finally, the FSIA created a new and additional substantive requirement by directing that claims against foreign sovereigns based on commercial transactions outside the United States must have a "direct effect" in the United States. *See* 28 U.S.C. § 1605(a)(2). No such requirement existed under pre-FSIA sovereign immunity law. *See, e.g., Restatement (Third) of the Foreign Relations Law of the United States* § 451 cmt.a., § 453, cmt.a. (1987) contrasting the FSIA, which requires that commercial activity have "specified links to the United States," with pre-FSIA restrictive theory of immunity which did not

require direct effect in the United States.)[10] This new requirement, therefore, also effected a substantial change to pre-existing sovereign immunity law.

III. THE SECOND CIRCUIT HAS CORRECTLY INTERPRETED THIS COURT'S PRECEDENTS.

A. The Second Circuit's analysis of *Amerada Hess* is correct.

SNCF contends that the Second Circuit has "distorted the clear holding" of *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) (Pet. at 10). But that contention is itself a distortion. In *Amerada Hess*, which preceded *Landgraf* by five years, this Court held that the FSIA is "the sole basis for obtaining jurisdiction" over the sovereign in a case to which the FSIA indisputedly applies. *Amerada Hess*, 488 U.S. at 434. In that case, this Court considered a situation where both the commencement of the action as well as the events giving rise to that action occurred *after* the FSIA's effective date. It found that there was no jurisdiction because none of the FSIA's exceptions to immunity applied. The Court was neither presented with nor considered the retroactive reach of all or any part of the FSIA.

In this case, the Second Circuit considered that opinion and found that "if the FSIA applies," District Courts may "entertain the case based solely on the jurisdictional provision of the FSIA." *See* Pet. App at 10a. Thus, *Amerada Hess* makes clear that when the FSIA applies to a case, it excludes grants of

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[10]SNCF's reference to an alleged "nexus to the United States" requirement (Pet. at 20) obfuscates the retroactivity issue by irrelevantly inserting a purely post-FSIA notion from § 1605(a)(2) of the FSIA into this case.

subject matter jurisdiction contained in other statutes. However, as the Second Circuit correctly found, the retroactivity principles set forth in *Landgraf* and *Hughes,* issued years after *Amerada Hess*, determine if the FSIA is to apply at all. Pet. App. at 12a-24a.

B. The Second Circuit Has Correctly Interpreted the *Dole* Decision.

SNCF claims that the Second Circuit erred in not finding *Dole* dispositive of the issue of whether SNCF is entitled to sovereign immunity. However, it is SNCF that errs when it asserts *Dole* held that "whether a defendant is immune under the FSIA" is determined as of the date of filing a claim. Pet. at 10. This is not what *Dole* holds, nor was any such issue before this Court in *Dole*.

Dole's holding is confined to an interpretation of a phrase contained in 28 U.S.C. § 1603(b)(2) relating to the definition of an "instrumentality" of a foreign state. *Dole* held that: (1) a subsidiary of an "instrumentality" under 28 U.S.C. § 1603(b)(2) is not itself an "instrumentality," and (2) "instrumentality" status is determined at the time of filing the complaint. *Dole*, 123 S. Ct. at 1659-60. All of the conduct at issue in *Dole* occurred after the enactment of the FSIA; *Dole* neither addressed nor decided any issue of FSIA retroactivity for conduct occurring before the enactment of the statute.[11]

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[11]Attempting to buttress its mis-reading of *Dole*, SNCF observes that Justice Kennedy in *Dole* cites the familiar rule that "'the jurisdiction of the court depends on the state of things at the time the action is brought.'" Pet. at 10, citing *Dole*, 123 S. Ct. at 1655, quoting *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993), which in turn is quoting *Mullen v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824). But these pre-*Landgraf* cases, as well as

(continued...)

IV. The Second Circuit's Order to Develop the Record Is Both Practicable and Judicial.

SNCF incorrectly claims that the Second Circuit's "approach" of ordering discovery regarding the historical position of the State Department on the issue of whether SNCF had sovereign immunity under pre-FSIA law conflicts with that of other Circuits (Pet. at 16-18) and will lead to a substantial increase in future actions seeking damages in United States courts from foreign sovereigns on the basis of events occurring during World War II. Pet. at 1. Neither claim is true.

A. The Second Circuit's order to develop the record is consistent with decisions of other circuit courts.

SNCF argues that the Second Circuit's direction to complete the relevant record is inconsistent with other Circuit Courts that have decided the retroactive reach of the FSIA. SNCF ignores the fact that the other Circuit Courts were able to consider available information on the position of the United States government. In *Altmann,* the Court determined that the expropriation exception to the FSIA could be applied retroactively, based on documents issued by the State Department contemporaneously with the events at issue. The State Department had clearly expressed its position that United States courts could

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[11](...continued)
Dole, and unlike the case at bar, did not have to address the potential impermissible retroactive application of a substantive statute. This Court has repeatedly stressed that, when dealing with issues of retroactivity, the "legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place....'" *Hughes*, 520 U.S. at 946 (quoting *Landgraf*, 511 U.S. at 265); *accord, INS v. St. Cyr*, 533 U.S. 289, 316 (2001).

adjudicate claims based upon Nazi expropriation of identifiable property. *Altmann*, 317 F.3d at 965. In *Joo*, the Court held that the FSIA could *not* be retroactively applied, basing its decision upon provisions of the "1951 Treaty of Peace with Japan signed by Japan and the Allied Powers." *Joo,* 332 F.3d at 684, *citing* 3 U.S.T. 3169.

These Courts reached opposite conclusions on the retroactivity of the FSIA. The different results arise from different underlying facts, not from a conflict on either "approach" or the need to perform a *Landgraf* analysis on a developed record.

In this case, no sufficient record has yet been developed upon which to begin the analysis done by the courts in *Altmann* and *Joo*; the Second Circuit has instructed the District Court to develop that record. The Second Circuit has directed the parties to obtain particular relevant evidence regarding, among other issues, the State Department's position on immunity for a state-owned but separately incorporated entity. Pet. App. at 25a-26a. The Second Circuit's remand of this case for such discovery is consistent with the approach of other Circuit Courts of Appeals, which have looked to precisely the kind of materials that discovery is intended to produce in this case.

B. There are no overreaching public policy reasons warranting review.

Nor does this case threaten to "drag the State Department" into a morass of civil litigation, as SNCF claims. Pet. at 30. The Second Circuit has not required the State Department to intervene or take any position on SNCF's claim of

immunity. It has merely directed the District Court to develop a record based on existing documentary evidence.[12]

SNCF questions whether such an inquiry is possible, relevant or hopelessly speculative, and asks, rhetorically, whether the Second Circuit wants the inquiry to focus on the Vichy, German occupation, liberation or post-war periods. Pet. at 26-27. This position condescendingly assumes that federal courts are unable to assess a large, diverse body of information on conflicting international treaties, State Department policy and related histories presented by the parties to litigation. However, this is what federal courts do, and what the District Court here should be permitted to continue to do. In fact, given that the Second Circuit's decision is for remand to complete a record, SNCF's petition for a writ of certiorari is premature. *See Brotherhood of Locomotive Firemen & Enginemen v. Bangor & A. R. & Co.*, 389 U.S. 327, 328 (1967) (denying certiorari "because the Court of Appeals remanded the case" and thus it "is not yet ripe for review by this Court").

SNCF incorrectly describes this case as one more in the purported "recent flurry of actions seeking damages in United States courts from foreign sovereigns on the basis of events occurring during World War II." Pet. at 1. SNCF raises a "flurry" of supposed public policy concerns that it argues would arise from letting the Second Circuit's decision stand. SNCF warns that failure to review the Second Circuit's decision will result in the doors being "open for a multitude of claims going back to World War II that previously were thought to be barred by sovereign

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[12]Based on the Second Circuit's opinion, the District Court has already requested this information from the State Department. *See* letter dated August 28, 2003, from the Honorable David G. Trager to the Honorable William Taft, Acting Legal Adviser, United States Department of State, attached hereto as Respondent's Appendix A.

immunity." Pet. at 30. As a last frightening prospect, SNCF insists that, unless the error of the Second Circuit is corrected, the State Department will be dragged back into civil litigation and the conduct of foreign relations will be impaired. Pet. at 30. These unsupported claims are meritless.

The predictions raised by SNCF are mere sophistry. SNCF continues to ignore the fact that this is not a suit against a sovereign government. This is a suit against a commercial corporation based on its commercial, profit-making activities that involved the deportation of human beings to their deaths. This case will not open the floodgates of litigation against foreign sovereigns for World War II era wrongs. Furthermore, in most cases in which the *Landgraf* analysis has been applied, the sovereign has been found to be immune.

CONCLUSION

Thus, there is no split in the Circuits. Moreover, this suit against a separate corporate entity, in which no government has appeared, does not interfere with foreign relations and does not affect the immunity of foreign sovereigns. This is a law suit brought by private litigants against a commercial corporation for specific historical injury. The concerns expressed by SNCF that a failure to hear this case will throw United States diplomacy into turmoil are mere hyperbole and without substance.

For all the reasons set forth herein, certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
225 CADMAN PLAZA EAST
BROOKLYN, NEW YORK 11201

CHAMBERS OF
DAVID G. TRAGER
DISTRICT JUDGE

August 28, 2003

The Honorable William H. Taft IV
Legal Adviser
United States Department of State
2201 C St. N.W.
Washington, D.C. 20520

Re: Abrams v. Société Nationale des Chemins de Fer Français
2000 Civ. 5326 (DGT) (CLP) (E.D.N.Y.)

Dear Mr. Taft:

The above-captioned action is pending before me. Plaintiffs allege that defendant Société Nationale des Chemins de Fer Français ("SNCF") aided and abetted war crimes in connection with the forced deportation by rail during World War II of Jews and other persons from France. The factual and procedural background of this case is set forth in the opinion of the United States Court of Appeals for the Second Circuit, *Abrams v. Société*

Nationale des Chemins de Fer Français, 332 F.3d 173 (2d. Cir. 2003).

After appeal by plaintiffs of this Court's dismissal of this case, the Second Circuit remanded for further discovery on the following issue:

> "The record contains no information with respect to the State Department's position during World War II on the significance of the corporate form in foreign sovereign immunity determinations. Nor is there any indication in the record whether the State Department would have recognized immunity in a case such as the one before us."

The Court of Appeals directed this Court to develop a record on which the Court could base a determination whether plaintiffs legitimately could have expected to litigate their claims in the United States. The Second Circuit suggested that this Court could benefit from any evidentiary materials that the State Department may have with respect to requests for immunity in the period prior to the adoption in 1952 by the Department of the restrictive theory of immunity.

It would greatly assist this Court if the State Department could provide information relevant to this factual inquiry. In particular, but without limiting your scope of interest, this Court would be assisted by having any records, letters, documents, or other information that the State Department has in its files or to which it can refer the Court concerning the following:

1. Guidelines or internal memoranda concerning the process by which the State Department addressed requests for sovereign immunity, including any reference to factors contributing to acceptance or rejection of such requests, with

respect to law suits regarding conduct occurring during the period 1941 through 1945;

2. Information on any instance where the State Department was approached by a foreign belligerent or by a country collaborating with or occupied by a belligerent, during World War II (or World War I if such documents exist), and was requested to grant sovereign immunity, as well as any decisions made to deny or grant immunity or to take no position, and the criteria used in making those decisions;

3. Any information concerning occasions on which the State Department was approached by any foreign government requesting immunity for a state-owned corporation before the effective date of the Foreign Sovereign Immunities Act (January 1977; 28 U.S.C. § 1330, *et seq.*), and the decisions reached by the State Department in response to such requests; and

4. Any other factual information that you think would assist the Court in making its determination.

In addition, the parties have brought to the Court's attention certain cases against SNCF (listed on the attached schedule) in United States courts from 1942 through 1962 in which SNCF did not claim immunity. This Court is presently unaware of whether the Vichy government or the French government requested sovereign immunity or whether the State Department took any position if that occurred. I would appreciate any information the State Department may have concerning sovereign immunity in connection with those particular cases.

To the extent documentary records are available that might help the parties and the Court to develop a record, I would ask you to make them available, or to indicate the means by which they might be identified, located and retrieved. In addition, I would be

grateful for any indication of possible witnesses or other persons with knowledge of the issues who could assist me in carrying out the Court of Appeal's mandate.

Finally, as stated above, the Second Circuit noted the absence of "any indication in the record whether the State Department would have recognized immunity in a case such as the one before us." I would appreciate, if you think it appropriate, your considered view whether the State Department would have recognized a sovereign immunity claim if this case had been brought in the immediate post-war period.

Thank you for your cooperation.

Sincerely,

/s/ David G. Trager
United States District Judge

cc:
Harriet Tamen, Esq.
Linda Silberman, Esq.

Enclosure

Abatangelo v. Société Nationale des Chemins de Fer Français,
Civil Action No. 88-391, Oct. 23, 1953

Dunajevski v. Société Nationale des Chemins de Fer Français,
35 N.Y.S..2D 102 (City Ct. of N.Y. Co. 1942)

Fuss v. French National Railroads,
35 Misc. 2d 682, 231 N.Y.S.2d 57 (Sup. Ct. N.Y. Co.), *affd*, 17 A.D.2d 941, 233 N.Y.S.2d 1013 (1st Dep't 1962)

Kaufman v. Société Nationale des Chemins de Fer Français,
Civil Action No. 92-130, Mar. 30, 1954

Schulman v. Compagnie Generale Transatlantique,
152 F. Supp. 833 (S.D.N.Y. 1957)

Siegmeier v. Société Nationale des Chemins de Fer Français,
1 A.D.2d 879, 150 N.Y.S.2d 775 (1st Dep't 1956)

Wheeler v. Société Nationale des Chemins de Fer Français (French National Railroads),
108 F. Supp. 652 (S.D.N.Y. 1952)